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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re E.J., a Person Coming Under the Juvenile Court Law.	
KERN COUNTY DEPARTMENT OF HUMAN SERVICES, Plaintiff and Respondent, v. O.J., Defendant and Appellant.	F059098 (Super. Ct. No. JD121973) **OPINION**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Kern County. Peter A. Warmerdam, Juvenile Court Referee.

Patrick M. Keene, under appointment by the Court of Appeal, for Defendant and Appellant.

[*] Before Wiseman, Acting P.J., Gomes, J. and Hill, J.

Theresa A. Goldner, County Counsel, and Mark L. Nations, Deputy County Counsel, for Plaintiff and Respondent.

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O.J. (appellant) appeals from the dispositional orders declaring his baby son, E.J. (the baby), a dependent, denying placement of the baby with him as a noncustodial parent, and denying him reunification services. Appellant claims the juvenile court erroneously determined that the Indian Child Welfare Act (ICWA) (25 U.S.C. § 1901 et seq.) did not apply and improperly denied his request for placement of the baby with him under Welfare and Institutions Code section 361.2.[1] We affirm the order.

FACTUAL AND PROCEDURAL BACKGROUND

The baby came to the attention of the Kern County Department of Human Services (Department) after the Department received a referral that the baby's mother had given birth to him and although both tested negative for drugs, mother had received three years of services with respect to her older children, had not completed her court-ordered case plan to regain custody of them, her family reunification services had been terminated, and a section 366.26 hearing was scheduled for the baby's siblings. The referral was substantiated and the baby placed into protective custody.

On August 31, 2009, the Department filed a petition alleging the baby came within the meaning of section 300, subdivision (b) (failure to protect), based on mother's long history of drug abuse, and subdivision (j) (abuse of sibling), based on mother's failure to reunify with the baby's half-siblings despite the provision of court-ordered services. Mother identified appellant as the baby's father, who had been arrested in April 2009 for possession of drugs and paraphernalia, which mother later admitted belonged to her.

[1] All further statutory references are to the Welfare and Institutions Code, unless otherwise stated.

Appellant filed a JV-505, statement regarding parentage, in which he stated he believed he was the baby's father, he had told friends and family the baby was his, he helped acquire items in anticipation of the baby's birth, and lived with mother off and on from April 2008 to April 2009, when he was incarcerated, and requested the court enter a judgment of parentage. At the detention hearing, mother testified that appellant was the baby's father, they were not married, they lived together when she become pregnant and since then, had lived together off and on until appellant's arrest and incarceration. Mother said they intended to live together after his release from custody. Appellant's attorney requested presumed father status for appellant, but stated he was willing to submit if the court's decision was to declare him the biological father, as appellant had not had the chance to accept the baby into his home. The court entered a judgment of paternity and found that appellant is the baby's biological father.

Appellant notified the court at the detention hearing that he thought he had Indian heritage through the Blackfoot or Cherokee tribes. Appellant, who expected to be released from custody in a little over two weeks and had previously told a social worker he would request placement of the baby upon his release from jail, asked if the court's order meant he would not be able to get his son. The court confirmed that was correct. Father then asked if he could request the baby be placed with mother, who was in a drug treatment facility. The court confirmed he could not. The court detained the baby from mother and ordered two-hour weekly supervised visits with the parents.

The Department notified the following tribes of the combined jurisdictional/dispositional hearing: United Keetoowah Band of Cherokee Indians, Cherokee Nation of Oklahoma, Blackfeet Tribe and the Eastern Band of Cherokee Indians. By the October 27, 2009, hearing, only the Blackfeet Tribe had responded with a letter stating that the baby was not on the tribal roll and therefore not an Indian child as defined by ICWA. The Cherokee Nation had also responded to the notice, but asked for additional information before making a final determination. The juvenile court noted the

lack of responses from the remaining two tribes and proceeded only with the jurisdictional aspect of the case, finding the petition's allegations true. The Department subsequently sent the Cherokee Nation the additional information it requested.

The dispositional hearing was held on December 4, 2009. The Department had received responses from the remaining tribes, namely the Eastern Band of Cherokee Indians, the United Keetoowah Band of Cherokee Indians, and the Cherokee Nation, all of which stated the baby was not eligible for tribe membership in any of the tribes. After confirming that all tribes had responded, the juvenile court found there was no reason to believe the baby is an Indian child and therefore ICWA did not apply.

The Department recommended mother receive reunification services, but that appellant not receive services due to his history of drug use, and conviction for second degree robbery, a violent crime. A social study prepared for the dispositional hearing noted that appellant was the non-custodial parent and had requested placement or services, but the Department was not recommending placement because he did not have stable housing, and had a history of drug use beginning in the 1980's that included the daily use of cocaine, and violence, as appellant admitted having robbed banks.

At the dispositional hearing, appellant testified that he had moved from the homeless shelter, where he had been living since his release from jail in October, into a room he rented. He was receiving unemployment and food stamps, and had started taking parenting and neglect classes. He was also participating in random drug testing. He had not missed a visit with the baby. Appellant was on federal probation until at least April 2010 as a result of robberies that occurred from 1997 through 2000; he had been released from federal custody in April 2008. While in federal prison, appellant had taken classes, including parenting and neglect. Appellant was arrested for possession of a controlled substance in April 2009, but the case went to trial and he was acquitted. Appellant was in jail when the baby was born. Appellant had been attending Narcotics

Anonymous meetings with mother since his release from jail. Appellant planned to get a job, take care of his children, which included a 14-year-old son, and stay in Kern County.

In argument to the court, appellant's attorney recognized it was appellant's burden to show by clear and convincing evidence that reunification was in the baby's best interests if he was to get services, and argued he had met that burden. Appellant's attorney requested that appellant be allowed to participate in reunification services, but if he had not met that burden, he would continue in services on his own and asked that the court continue the visitation order. After hearing argument from the other parties, the court explained, with respect to appellant, that although he made a good impression in court, he was a biological father and therefore had to show reunification benefits the child, and "when I get into the presumed father -- or, you want to consider a situation," he has a violent felony and therefore cannot be offered services unless the court found by clear and convincing evidence that reunification was in the child's best interest. The court found that appellant had not met that burden. The court adjudged the baby a dependent, removed him from mother's custody, ordered reunification services for mother and denied "the request of the noncustodial parent for placement of the child." The court further found that "as a biological father, services would not benefit the child," and "denial of services to the father is justified" under section 361.5, subdivision (b)(12), as he had been convicted of a violent felony, and there was not clear and convincing evidence that providing services would benefit the child. The court ordered supervised visits with appellant to occur every other week for two hours, and authorized him to use the Department's drug testing call-in system, although he had to test at an independent lab at his own expense.

DISCUSSION

ICWA Notice

At all stages of a dependency proceeding, the juvenile court must comply with the ICWA. The ICWA was enacted to protect the interests of Indian children and to promote

the stability and security of Indian tribes and families. (25 U.S.C. § 1902; see, e.g., *In re Elizabeth W.* (2004) 120 Cal.App.4th 900, 906.) An Indian child, within the meaning of the ICWA, is a child who is either a member of an Indian tribe or is eligible for membership and is the biological child of a member. (25 U.S.C. § 1903(4); § 224.1, subd. (a).) Where a state court "knows or has reason to know" that an Indian child is involved in a dependency proceeding, statutorily prescribed notice must be given to all tribes of which the child may be a member or eligible for membership. (25 U.S.C. § 1912(a); § 224.2, subd. (a)(3); *In re Samuel P.* (2002) 99 Cal.App.4th 1259, 1264.) A determination by an Indian tribe that a child is or is not a member of or eligible for membership in that tribe is conclusive. (§ 224.3, subd. (e)(1).)

Appellant contends the juvenile court erred when it determined ICWA did not apply because no response was received from the United Keetoowah Band. The record shows, however, that such a response was mailed on November 10, 2009, and filed with the court on November 16, 2009, and that the tribe stated it had searched its enrollment records and there was no evidence the baby was a member of or eligible for enrollment in the tribe. As responses also were received from the other three tribes stating that the baby was not an Indian child within the meaning of ICWA, the court did not err when it determined ICWA did not apply.

Custody Determination

Appellant next contends that despite his repeated requests for placement of the baby with him, the juvenile court improperly denied his requests without specifying the reasons for the denial. He relies on section 361.2, subdivision (a), which provides: "When a court orders removal of a child pursuant to Section 361, the court shall first determine whether there is a parent of the child, with whom the child was not residing at the time that the events or conditions arose that brought the child within the provisions of Section 300, who desires to assume custody of the child. If that parent requests custody, the court shall place the child with the parent unless it finds that placement with that

parent would be detrimental to the safety, protection, or physical or emotional well-being of the child." He asserts that the court failed to specifically find that placement with him would be detrimental and failed to make any factual findings supporting denial of placement with him.

His argument is flawed, however, because at the time of the dispositional hearing he had been declared the baby's biological - not presumed - father. As explained in *In re Jerry P.* (2002) 95 Cal.App.4th 793, 801, "[p]resumed father status ranks highest." Importantly, "only a presumed, not a mere biological, father is a 'parent' entitled to receive reunification services under section 361.5," and custody of the child under section 361.2. (*In re Zacharia D.* (1993) 6 Cal.4th 435, 451; *In re Jerry P., supra,* at p. 801; accord, *In re Vincent M.* (2008) 161 Cal.App.4th 943, 955 ["'a biological father is not entitled to custody under section 361.2'"]; *In re Andrew L.* (2004) 122 Cal.App.4th 178, 191 [same].) "Biological fatherhood does not, in and of itself, qualify a man for presumed father status under [Family Code] section 7611. On the contrary, presumed father status is based on the familial relationship between the man and child, rather than any biological connection." (*In re J.L.* (2008) 159 Cal.App.4th 1010, 1018.) Because appellant was not the baby's presumed father, he was not a "parent" subject to the provisions of section 361.2. Accordingly, the court was not required to find detriment when it denied placement of the baby with him.

DISPOSITION

The juvenile court's dispositional orders are affirmed.